IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 891 of 2002

Maharashtra General Kamgar Mahasangh.. Petitioner

versus

M/s.Tapan Chatterjee & Co. .. Respondent

...

Mr.N.M. Ganguli for the petitioner.

Mr.S. Shetty for the respondents.

CORAM : D.G. KARNIK,J.

DATED : 5th July 2005.

ORAL JUDGEMENT:-

1. By this petition, the petitioner challenges the judgement and order dated 20th December 2001 passed by the Industrial Court, Mumbai dismissing its complaint filed under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 (for short 'the Act').

2. The respondent was carrying on business of giving on hire to the members of Indian Motion Pictures Association movable generating sets mounted on motor vehicles. Three persons are required for operation of each generating set. One is an operator who operates the generating set; the second is a helper/assistant who helps the operator and the third is a driver who drives to the site the motor vehicle on which the generating set is mounted. The case of the petitioner is that the respondent who was the owner of 7 movable generating sets had employed 21 employees in connection with the business of giving on hire of the generating sets. Though all the employees were employed for more than 10 years they were not given weekly off nor were they given any privilege leave. They were required to work on shifts and sometimes continuously for more than 18 hours at the time of shooting of films but were not paid any overtime allowance. In October 1998, the petitioner union filed a complaint on behalf of the 21 workmen whose names were mentioned in the annexure to the complaint alleging that the respondent was indulging in the unfair labour practices under item 1 of

Schedule II and items 9 and 10 of schedule IV of the Act. By filing a written statement, the respondent resisted the complaint, inter alia contending that the 21 persons named in the annexure to the complaint were not its employees. The respondent admitted that it was carrying on the business of giving on hire the movable generating sets to the members of the Motion Picture Association. The respondent produced on record the work schedules which showed that in any month a generating set was given on hire only for 6 to 11 days. The respondent further contended that a film producer hiring a generating set also hired a team of 3 crew members consisting of an operator, an assistant and a driver. The film producer paid the wages and/or the charges directly to the operator who distributed them among the crew of three. The respondent did not pay the wages but it only handed over the moving generator set to the team which took it to the site and returned. The respondent exercised no degree of control over the operator and the crew which worked under the directions and supervision of the concerned film producer. The respondent therefore contended that the operators, assistants and drivers were not his employees.

3. After considering the evidence adduced by the parties, the Industrial Court came to the conclusion that the persons mentioned in the annexure to the complaint were not working for or under the control and supervision of the respondent. They were independent persons and were not the workmen of the respondent. It therefore, dismissed the complaint filed by the petitioner by a judgement and order dated 20th December 2001. That judgement is impugned by this petition.

4. Learned counsel for the petitioner submits that the finding of fact recorded by the Industrial Court that the persons mentioned in the annexure to the complaint were not the workmen of the respondent is not only erroneous but is perverse. He submits that the oral and documentary evidence produced on record by the parties has mis-appreciated by the Industrial Court. He further submits that appropriate tests laid down by the Supreme Court in several cases to determine whether there exists a relationship of an employer and an employee between the parties have been ignored resulting into a perversity. In suport of this contention, the

learned counsel referred to and relied upon the following decisions :

i) Birdhichand Sharma Vs. First Civil Judge, Nagpur& ors. reported in 1961 II LLJ 86 (SC).

ii) Dharangadhara Chemicals Works Ltd. Vs. State of Saurashtra reported in AIR 1957 SC 264.

iii) Silver Jubilee Tailoring House Vs. Chief Inspector of Shops and Establishments & Anr. reported in AIR 1974 SC 37.

iv) Shining Tailors Vs. Industrial Tribunal II. U.P. and ors reported in 1983 I LLJ 413.

v) Indian Banks Association Vs. Workmen of Syndicate Bank & ors reported in 2001 I CLR 986.

vi) Seema D. Jadhav Vs. Maharashtra General Kamgar Union, {Writ Petition no.1261 of 2005 decided on May 2, 2005 Coram : Dr.D.Y. Chandrachud, J)

5. In Birdhichand Vs. First Civil Judge,

Nagpur (Supra) the Supreme Court has held that prima facie test for determining whether the relationship of master and servant or employer and employee existed between the two parties was the existence of the right in the employer not merely to direct what work was to be done but also to control the manner in which it was to be done. The Court further held that the nature and extent of control was incapable of being precisely defined and was likely to vary from industry to industry.

6. In Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra (Supra), the Supreme Court reiterated that prima facie test for determination of relationship between master and servant was existence of the right in the master to supervise and control the work done by servant not only in the matter of directing what work the servant was to do but also the manner in which he would do the work. The nature or extent of the control which was required to establish the relationship of employer and employee would vary from business to business and from its very nature was incapable of precise definition. The correct approach therefore, would be to consider whether having regard to the nature

of the work there was due control and supervision by the employer. A person can be a workman even though he is paid not per day but by the job.

7. In Silver Jubilee Tailoring House Vs. Chief Inspector of Shops and Establishments (Supra) the Supreme Court held the right to control the manner of work was not the exclusive test for determining the relationship of employer and employee. It has also to be considered as to who provides the equipment. It might be that little weight can nowadays be put upon the provision of tools of minor character as opposed to plant and equipment on a large scale. So far as tailoring was concerned, the fact that sewing machines on which the workers do the work generally belonged to the employer was an important consideration for deciding whether the relationship was that of master and servant.

8. In Shining Tailors Vs.Industrial Tribunal-II U.P. (Supra) the Supreme Court held that the right of removal of the workmen and not to give the work had the element of control and supervision.

9. In Indian Bank Association Vs. The Workmen of Syndicate Bank & ors. (Supra) the issue was whether the various deposit collectors who were appointed as commission agents for the purpose of collection of deposits for the bank were workmen of the bank. On behalf of the association of banks, it was submitted that the deposit collectors did their work without any control or supervision of the bank, they had no fixed time or period to develop their work as deposit collectors or for their attendance in the bank, they could go to the bank at any time and make the deposits, no disciplinary action could be taken against them by the bank and therefore they were not the workmen of the bank. Repelling the contention that the banks had no control over the deposit collector, the Supreme Court held that they were the workmen of the banks. The deposit collector were free to regulate their own hours of work because they were required to go to the depositors at their convenience and as required by the depositors but fixed time alone could not be a criteria for considering whether they were the workmen of the banks. In as much as the deposit collectors were required to bring the collections

and deposit on the very next day, were required to fill in various forms, account registers and pass books, they were held to be accountable to the banks and under control of the banks.

10. In Seema D. Jadhav Vs. Maharashtra General Kamgar Union, (Supra) this Court held that the workmen engaged by a gas service station for the purpose of carriage of the gas cylinder to the consumers and who were paid Rs.2/- as remuneration per cylinder were the workmen of the gas service station.

11. From the various decisions referred to above one thing that is clear is that no one test can be applied for determining whether there exists a relationship of master and servant between two persons. Several tests have been applied by courts to ascertain whether the relationship of master and servant exists between the parties. No one test would be universally conslusive but the court would be required to look to all the circumstances of a case to determine whether there exists a relationship of a master and a servant between the two parties. Some of the tests which are generally

applied by the Court for determining whether there exists relationship of a master and a servant are as follows:-

i) Existence of the right of the master to supervise and control the work done by the servant. The extent of such right is also relevant. It is relevant to consider the master's right of directing what work the servant would do and also the manner in which he would do the work. The nature and extent of control which is required to establish the relationship of employer and employee would necessarily vary from business to business and is incapable of precise definition. (See Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra and Birdhichand Sharma Vs. First Civil Judge, Nagpur).

ii) The right to control the manner of work though a dominant is not the exclusive test for determining the relationship of employer and employee. The court would be entitled to consider who provides the equipment necessary for the work. Where the tools required are minor litle weight may be attached to the fact taht they are supplied by the employer but where the entire plant and

equipment on a large scale is provided by the employer that fact would be relevant. (See Silver Jubilee Tailoring House Vs. Chief Inspector of Shops).

iii) The right of removal of the workman or to give the work has an element of control and supervision {see Shining Tailors Vs. Industrial Tribunal-II U.P.}

iv) Who pays the wages or on whose account the wages are payable is also a relevant factor. The wages may be payable on a monthly, weekly, daily or hourly basis or wages may even be payable in proportion to the work done or as a percentage by way of a commission, like the commission paid by a bank to a deposit collecting agent (see Indian Bank Association Vs. The Workmen of Syndicate Bank & ors) or like a fixed sum for a fixed job like fixed charges to a gas delivery boy by a gas agency (see Seema D. Jadhav Vs. Maharashtra General Kamgar Union)

12. In the light of aforesaid propositions, it

would be necessary to see whether the Industrial Court has applied the correct tests for considering whether the persons mentioned in annexure to the complaint were the employees of the respondent.

13. The Industrial Court has recorded a finding of fact that wages were paid to the crew of the mobile generating sets by the film producers who hired the sets. According to Shri Salim Shaikh, the alleged workman examined on oath, party who hired the generator van paid the labour charges. He has admitted that the producer paid the wages per shift in the hands of the operator at the shooting site. The wage slips were prepared by the generator operator and given to the producer who paid the wages of the crew in the hands of the operator for being distributed amongst himself, the assistant and the driver. The Industrial Court has considered the evidence of Salim Shaikh and other witnesses in paragraph nos.12 to 14 of its judgement. The finding recorded by the Industrial Court that the wages were paid not by the respondent but by the producers is supported by evidence and is a possible and probable finding of fact.

14. The Industrial Court has also noted that the right to engage the workmen did not solely vest in the respondent. Only a person who was a member of the film producer association could be employed as a crew member. The association of film producers provided identity cards to the approved crew members and only a person holding such identity card could be engaged. Thus, the petitioner had no right to engage any workmen at his will, but only the person who was a member of the association of film producers and possessed an identity card issued by film producers association could only be engaged in the transportation and operation of the generating sets. The Industrial Court has taken into consideration this relevant fact. Judgement is not based entirely on this fact but this circumstance has rightly been taken into consideration by the Industrial Court as one of the circumstances while weighing the evidence produced before it.

15. It was the case of the petitioner that the workmen mentioned in annexure were employees of the respondent and were engaged only by the respondent who was providing the work to them. Mr. Mohd. Shafi Mohd.(C.W 4) who was previously working as an

operator on one of the generating set of the respondent was examined as a witness before the Industrial Court. He has stated that during the time when he worked as an operator given on hire by the respondent, he used to receive the wages directly from the film producers. He has further stated that subsequently he started his own business in the name of KGN Power. Atleast four persons who were named as the employees of the respondent in the complaint were engaged by him in the business of KGN power. He produced proof about payment of wages to the three of the workmen. Theoratically, it is possible that a person may be employed in two or more concerns unless there is a prohibition in the contract of employment. However, that is not the general pratise. No employer would certainly like his employees to work for a competitor. KGN Power was a competitor of the respondent and was engaged in the business of hiring of the generating sets. The fact that some of the alleged employees of the respondent were also simultaneously working for a competitor was therefore certainly a circumstance which could have been considered by the Industrial Court while considering whether there existed a relationship of master and servant between the

respondent and the persons named in the annexure to the complaint. In my view, the Industrial Court has committed no error in taking into consideration this fact while considering whether there existed a relationship of master and servant.

16. Mr.Ganguli was unable to point out any other material which was wrongly considered by the Industrial Court for arriving at a conclusion that there existed no relationship of master and servant between the parties. Taking an overall view of the matter and after going through the evidence to which my attention was drawn by Shri Ganguli, I am satisfied that the view taken by the Industrial Court is a possible view on facts. In exercise of a writ jurisdiction under Article 226 of the Constitution of India, the possible findings of fact recorded by the Industrial Court cannot be set aside unless shown to be perverse.

17. In the circumstances, there is no merit in the petition which is hereby dismissed. In the facts and circumstances of the case, parties shall bear and pay their own costs. Rule discharged.

D.G. KARNIK, J